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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 494

SAM ADAMS,

Petitioner,

vs.

THE STATE OF TEXAS.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

RONALD SMALLWOOD,
KARL M. GIBBON,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI

To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Sam Adams, respectfully submits his petition for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas in the above entitled case.

On June 7, 1944, the Court of Criminal Appeals of Texas affirmed the judgment of the Criminal District Court of Cameron County, Texas, wherein petitioner was convicted of murder with malice aforethought and his punishment assessed at confinement in the penitentiary for a term of from two to ten years (judgment of Court of Criminal Appeals, page 76.) On June 23, 1944, the Court of Criminal Appeals overruled petitioner's motion for rehearing, page 80).

Statement of Case

Petitioner was charged by indictment with the murder of Jay McCoy on July 11, 1943. The trial was to a jury who found him guilty as charged (R. 13), after petitioner had by motion requested the court to instruct the jury to find him not guilty of murder with malice, which motion was overruled (R. 7).

Question Presented

The conviction of petitioner of murder with malice, and the affirmance thereof, in the light of the record, denies petitioner due process of law in violation of the 14th Amendment to the Constitution of the United States, in that no malice was shown to exist and no evidence was introduced from which malice could be inferred. The Court of Criminal Appeals of Texas, being the highest criminal appellate court, having repeatedly held that in order for a conviction of murder with malice to be sustained, either express malice must be shown or evidence must be introduced from which it may be implied, the failure of such Court of Criminal Appeals of Texas to reverse the conviction abridges a fundamental right given petitioner by the decisions of such Court of Criminal Appeals, and denies him due process of law.

Argument of Question Presented

The decisions of the highest appellate court of a State construing the criminal statutes thereof are as much a part of the law of that State as are the statutes. After the highest appellate court has repeatedly held that a conviction of murder with malice will be reversed unless malice, express or implied, is shown, the failure to reverse a case where no express malice is shown and where none may be inferred from the evidence, denies a citizen that equal pro-

tection and due process contemplated by the 14th Amendment.

In this case express malice was not shown. The Court of Criminal Appeals, in its opinion on motion for rehearing, holds that the facts and circumstances are sufficient to justify the jury's conclusion that the killing was upon malice aforethought.

Petitioner relied for reversal upon the cases of *Ely* v. *State,* 141 S. W. (2) 626, and *Parks* v. *State,* 99 S. W. (2) 943, decided by the Court of Criminal Appeals of Texas. In those cases the court announced the rule that where malice is not expressly shown, and where it may not be implied from the evidence, a reversal must follow. In each case the defendant was not acquainted with the deceased prior to the killing. No reason or motive was shown for the homicide in either case other than from passion or anger suddenly arising and produced by an adequate cause. In both of those cases the Court of Criminal Appeals applied the rule established and reversed the convictions of murder with malice. In this case the evidence conclusively established that petitioner was not acquainted with the deceased prior to the homicide. No reason or motive for the killing was shown other than that petitioner and deceased became engaged in a quarrel and fight, as a result of which the deceased was killed. The Court of Criminal Appeals, in part, agreed with the contention of petitioner in its original opinion because it said:

> "Malice may be either express or implied, and in the absence of malice of either kind, and failing to have present self-defense, we would have to say herein that as a matter of law we have here presented a case of adequate cause which rendered the mind incapable of cool reflection."

In the opinion on motion for a rehearing the Court of Criminal Appeals attempted to distinguish between the *Ely* and

Parks cases, *supra.* It stated that in the *Ely* case the killing occurred in connection with an illegal arrest and that no such facts existed in this case. However, the question of whether or not the killing was done in connection with an illegal arrest would have no bearing upon the question of malice. If the defendant in the *Ely* case had a right to resist an illegal arrest, that would constitute a defense and he would not be guilty of any class of murder; but such matter would not bear on the question of malice.

The Court of Criminal Appeals attempted to distinguish the *Parks* case by pointing out that the killing occurred after the defendant had been attacked by the deceased, and that he shot the deceased in the defense of his person. Certainly, such a question would have no bearing upon the issue of malice. If the defendant acted in self-defense that would constitute a defense and he would not be guilty of any class of murder, either with or without malice; but such question of self-defense does not bear on the issue of malice.

In the instant case the Court of Criminal Appeals, summing up its reasoning for affirming the conviction of murder with malice, stated as follows:

> "In the instant case, State's witnesses testified that, immediately before appellant began the fatal attack, he was heard to say, in effect, that the reason deceased did not agree with him in his contention that the car was parked wrong was because he (appellant) had a "black face". This, together with the other facts and circumstances, warranted the jury's conclusion that the killing was upon malice aforethough."

Was the Court of Criminal Appeals of Texas justified in concluding that the petitioner, a negro, merely in stating at the time of the homicide that the deceased was not in agree- with him was because he (petitioner) had a "black face," evidenced such malice or ill will toward deceased so as to justify the conclusion that the killing was upon malice? If

it can affirm every murder case where a negro has killed a white man and infer malice with no evidence thereof other than the assumption that every negro bears malice toward every white man, then there is a complete denial to the negro of the equal protection of the laws merely because of his color. It is true that the Court of Criminal Appeals says that there are other facts and circumstances which warranted the jury's inference of malice but, search the record as we have, we find nothing which will bear out such statement. It leaves us to believe that there are, somewhere in the record, facts which support the inference of malice, but the particular evidence is not identified or pointed out.

This Court, in the case of *Howard* v. *Fleming,* 191 U. S. 126, has held that the decisions of the highest court of a State in criminal cases are a part of the law of that State; and that, where the proper procedure for the trial of citizens, as defined in such decisions, is complied with, there is no denial of due process.

In *Howard* v. *Fleming, supra,* the trial court failed to charge the jury on the presumption of innocence. The State Supreme Court held that an omission to refer to any presumption of innocence does not invalidate the proceedings. This Court, in its opinion, stated:

> "In the face of this ruling as to the law of the state, the omission in a state trial of any reference to the presumption of innocence cannot be regarded as a denial of due process of law."

In other words, if we rightly construe the meaning of *Howard* v. *Fleming,* this Court holds that as long as a criminal trial proceeds along the lines of proper procedure as construed and set forth in the decisions of the highest court of a State, there is no denial of due process. On the other hand, where there is a failure to afford a citizen a

substantial right in a criminal case, in accordance with and as given him by the decisions of the highest court of such State there is a denial of due process of law which will be corrected by the Supreme Court of the United States.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court directed to the Court of Criminal Appeals of Texas, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the Court of Criminal Appeals of Texas in this cause, to the end that it may be reviewed and determined by this Honorable Court as provided by the Statutes of the United States; and that the judgment herein of said Court of Criminal Appeals of Texas be reversed by this Honorable Court, and for such further relief as to this Court may seem proper.

Respectfully submitted,

SMALLWOOD AND GIBBON,
Harlingen, Texas;
Attorneys for Petitioner

UNITED STATES OF AMERICA,
State of Missouri,
City of St. Louis.

Ronald Smallwood, being duly sworn, deposes and says: I am one of the attorneys for the petitioner in the above-entitled cause. I have read the foregoing petition and the same is true as I verily believe.

RONALD SMALLWOOD.

Sworn to before me this 9th day of September, 1944.

MARIE REDMAN,
Notary Public.

[Seal.]

My Commission expires January 29, 1947.

We hereby certify that we have examined the foregoing petition for a writ of certiorari, and in our opinion such petition is well founded and should be granted by this Honorable Court and the same is not presented for purposes of delay.

SMALLWOOD AND GIBBON,
By RONALD SMALLWOOD,
Harlingen, Texas;
Attorneys for Petitioner.

(4007)

Murphy

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Attorney General of Texas
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Assistant Attorneys General
ERNEST GOEMS
State's Attorney
Attorneys for the State of Texas

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STATEMENT OF THE CASE

Petitioner was indicted, tried and convicted of murder with malice and assessed a punishment of ten years in the penitentiary. The case was duly appealed to the Court of Criminal Appeals, the highest appellate court in the State of Texas having jurisdiction of criminal cases, and that court has in all things affirmed the judgment of the trial court.

The petitioner seeks review of his case by certiorari on the sole allegation that no evidence of ei-

ther express or implied malice was shown on the trial and that the Court of Criminal Appeals in affirming the case disregarded its former holdings and thereby denied him due process of law in violation of the 14th Amendment to the Constitution of the United States.

The State of Texas denies such allegation and affirms that there is ample evidence in the record to justify the finding that the homicide was murder with malice under Texas statutes and decisions. The State of Texas explicitly disavows that any departure from precedent is to be found in the opinion of its court of last resort and affirmatively pleads that the decision reached in the instant case is in harmony with the uniform construction heretofore placed upon the statutes of the State defining murder and prescribing the practice and procedure in trying such cases.

The respondent, State of Texas, submits that this court has no jurisdiction to hear and determine this cause; that no substantial Federal question is presented, but the sole question is one of fact, constitutionally and legally decided adversely to petitioner; that therefore the petition for writ of certiorari should be denied. In the alternative, if it be determined that this court does have jurisdiction, it is submitted that there is no error in the record which would justify this court in reversing the judgment of the Court of Criminal Appeals of Texas.

FIRST COUNTER POINT: This court has no jurisdiction to determine whether there was any evidence to support the judgment as rendered by the Court of Criminal Appeals in Texas, it being a fact question and no federal question being involved.

SECOND COUNTER POINT: The evidence is sufficient to sustain the verdict fo the jury.

STATEMENT, ARGUMENT AND AUTHORITIES

Under Points One and Two

The Court of Criminal Appeals, in its original opinion has briefly, but very fairly, reviewed the facts, both from the viewpoint of the State and the accused.

Petitioner drove his car into one parked on the street in the night time; upon being accosted by the owner, he insisted that the vehicle into which he had driven his machine was parked wrong. The owner did not agree with him. Petitioner then said: "The reason you side against me is because I have a black face." (Tr., p. 25).

Deceased and another arrived upon the scene and petitioner repeated his statement: "See there, that car is parked wrong." Neither of the men agreed with him. Petitioner again said: "The reason you side against me is because I have a black face." The

deceased examined the location of the cars and stated: "That car was not parked wrong." Petitioner then said: "You are a damn lying son-of-a-bitch" (Tr., pp. 27, 45), or "just a God-damned liar" (Tr., p. 37) and "at the same time he commenced striking" at deceased (Tr., pp. 19-20). Deceased and petitioner exchanged blows, petitioner striking the first blow (Tr., p. 20). Prior to this time petitioner had been seen to put his hand in his pocket (Tr., p. 37); a knife was afterwards found under a car in the street nearby (Tr., pp. 52, 53). Petitioner on direct examination virtually admitted ownership of the knife (Tr., p. 64). The knife was of an overall length of about 8 5/8 inches, the blade being 4 3/8 inches long. Deceased died of a stab wound in the left leg which severed an artery.

"Murder" is defined by Article 1256, Vernon's Annotated Penal Code of Texas, as follows:

> "Whoever shall voluntarily kill any person within this State shall be guilty of murder. Murder shall be distinguished from every other species of homicide by the absence of circumstances which reduce the offenses to negligent homicide or which excuse or justify the killing."

The punishment for murder is prescribed by Article 1257, Vernon's Annotated Penal Code:

> "The punishment for murder shall be death or confinement in the penitentiary for life or for any term of years not less than two."

In Article 1257b, Vernon's Annotated Penal Code, it is provided:

> "In all cases tried under the provisions of this Act, it shall be the duty of the court to define 'malice aforethought' and shall apply that term by appropriate charge to the facts in the case and shall instruct the jury that unless from all the facts and circumstances in evidence the jury believes the defendant was prompted and acted with his malice aforethought, they cannot assess the punishment at a period longer than five years; . . . ."

Article 1257c, Vernon's Annotated Penal Code, provides:

> "In all cases tried under the provisions of this Act it shall be the duty of the Court, where the facts present the issue of murder without malice, to instruct the jury that murder without malice is a voluntary homicide committed without justification or excuse under the immediate influence of a sudden passion arising from an adequate cause, by which it is meant such cause as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection, and in appropriate terms in the charge to apply the law to the facts as developed from the evidence."

Paragraph 2 to 9 of the court' charge (Tr., pp. 7-9) correctly states the law of Texas relating to murder, murder with malice, and murder without malice and correctly states the proper method of apply-

ing the law to the facts. Of this charge there was no complaint in the trial court nor on appeal. Hundreds of decisions of the Court of Criminal Appeals give express sanction to this as a proper charge.

There is no contention by petitioner that the above statutes of Texas are invalid or repugnant to the Constitution or laws of the United States. This is not a "confession" case. It is argued that the Court of Criminal Appeals "has repeatedly held that a conviction of murder with malice will be reversed unless malice, express or implied, is shown." The entire appeal for the writ is predicated upon the contention that there is no evidence of either express or implied malice in the case. This is, in effect, nothing more than an attempt to have this court to review the weight of the evidence for the purpose of determining whether the killing was murder with or without malice as those terms are defined by the Texas statutes. This is a fact question, which was fully submitted to the jury. It was considered and the conviction sustained by the Court of Criminal Appeals over the specific objection that it was not supported by the evidence.

Respondent submits that the question is one of fact merely which is not open to review of this court. See *Whitney* v. *People of State of California*, 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095.

The rule is well settled that it is not the province of this court to weigh conflicting testimony. If the

record shows testimony supporting the verdict, that is as far as the court is justified in going. Under such circumstances, the decision of a State court upon a question of fact in applying state statutes is final and conclusive upon this court. *Great Northern R. Co.* v. *Donaldson*, 246 U. S. 121, 38 S. Ct. 230, 62 L. Ed. 616; *Smiley* v. *Kansas*, 196 U. S. 447, 25 S. Ct. 289, 49 L. Ed. 546.

However, if this court now takes a different view as to the above propositions of law, we respectfully insist that the facts, viewed from the standpoint of the prosecution, are more than ample to sustain the submission to the jury of the question of whether accused acted with malice, and to sustain the jury's finding upon such submission. It has been held that on the issue of malice the jury's finding will not be disturbed on appeal, unless unsupported by any evidence. *Duhon* v. *State*, 129 Tex. Cr. R. 540, 90 S. W. (2d) 249.

The cases of *Ely* v. *State*, 139 Tex. Cr. R. 520, 141 S. W. (2d) 626 and *Parks* v. *State*, 131 Tex. Cr. R. 464, 99 S. W. (2d) 943, cited by petitioner are clearly distinguished from the instant case by the opinion of the Texas court on motion for rehearing. In neither of said cases is the fact situation analogous to the one now under consideration. In each of those cases the court held, on the facts there presented, that the evidence was insufficient as a matter of law to establish malice; in each case the facts were undis-

puted and the court said no evidence appeared in the record to show malice, either express or implied.

Of necessity, in applying the Texas statutes governing murder, each case stands upon the particular facts there involved. The Court of Criminal Appeals, in applying the facts in the light of its construction of the statutes, and after analysis of the fact situation in this case, has held the evidence sufficient to authorize the jury to pass upon the issue and determined whether in fact petitioner acted with malice. Whether, in other cases, arising under different facts, the court might hold differently is an inquiry that is entirely immaterial here. In *Atlantic Coast Line Railroad Company* v. *Ford*, 287 U. S. 502, 77 L. Ed. 457, 53 S. Ct. 249, it is said:

> "Appellants review many decisions of the State Supreme Court dealing with the question, which seem not to be altogether in agreement; but it is not necessary to analyze these decisions and from them attempt to extract the rule. The Court below has done this and reached a conclusion contrary to that advanced by appellants; and that is enough for the purposes of our decision here. If the assailed provisions as construed and applied in the present case afford due process, appellant cannot complain that in earlier cases they were so construed and applied as to deny due process to other litigants."

We utterly fail to perceive any denial of due process in this case. Petitioner is simply asking this court to review the facts in this case and substitute

its judgment for that of the jury, the court trying the case and the highest appellate court of Texas on the one question of whether petitioner in killing another citizen of Texas, was prompted by and acted with malice aforethought. There is no Federal question involved. It has long been the fixed rule of this court that the determination of a State court as to the proper construction of a State statute which does not involve a Federal question is conclusive. *Osborne* v. *State of Florida*, 164 U. S. 650, 41 L. Ed. 586, 17 S. Ct. 214.

There is not the slightest inference that the indictment was returned by a grand jury in anywise prejudiced against petitioner. There is no challenge of any kind to the fairness of the trial court nor to the composition of the jury. No claim exists to question the admissibility of any evidence. Simply because of his own statements, made immediately prior to the fatal stabbing of deceased, that the reason the parties present did not agree with him as to the position of the automobile he had damaged through collision was because his face was black, followed by a highly profane and opprobious epithet applied to deceased and an unprovoked attack with a deadly knife, the petitioner avers, following proof and conviction, that he was denied due process of law under the Federal Constitution! This, because the court said the jury was within its province in finding the existence of malice, seems to be the theme upon which he seek the interposition of this court. The words spoken and the acts committed were petition-

er's alone. The settled law of Texas is that the existence of malice is inferred from the acts committed or words spoken. The Texas court applied the law.

WHEREFORE, the State of Texas prays that this cause be dimissed. In the alternative, it prays that the judgment of the Court of Criminal Appeals be in all things affirmed.

Respectfully submitted,

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